United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

United States Court of Appeals
Second Circuit

Docket No.: 76-7547

NORTHEASTERN INDUSTRIAL PARK, INC. and
D. E. LONG, INC.,

Plaintiffs,

NORTHEASTERN INDUSTRIAL PARK, INC.,

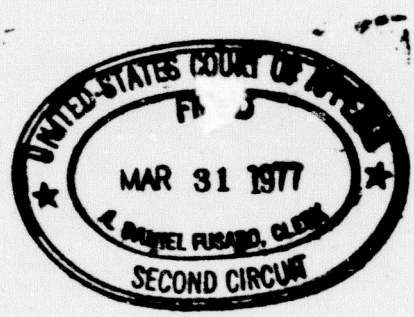
Plaintift-Appellant-Cross-Appellee

vs.

LOCAL 294, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Defendant-Appellee-Cross-Appellant

PLAINTIFF-APPELLANT'S REPLY BRIEF AND PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO APPELLEE'S CROSS-APPEAL



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PLAINTIFF-APPELLANT'S REPLY BRIEF

POINT I

APPELLEE'S ARGUMENT THAT APPELLANT'S DAMAGES FOR LEGAL EXPENSE MUST BE LIMITED TO THE TIME PRIOR TO THE RESUMPTION OF WORK IS WITHOUT MERIT.

Under Point II A of its brief, the appellee urges the proposition that the moment of work resumption ends the period during which recoverable legal expense may be incurred.

No case clearly supporting such a proposition is cited. Moreover, such restrictiveness ignores reality. Legal proceedings once commenced can only insure their intended result by being brought to a successful conclusion. This has been recognized in several of the cases that have sustained the recovery of legal expense as an item of damage. In the case of Refrigeration Contractor's Inc. v. Local Union #211, Plumbers and Pipefitters, 501 F2d 668, the union which had caused the work stoppage voluntarily resumed work after its actions had precipitated the commencement of NLRB proceedings. The court noted that the union's contention that attorney's fees could not be awarded for the NLRB proceeding

because of the resumption of work was without merit. Similarly, in the case of Sheet Metal Workers, International Association Local Union #233 v. Atlas Sheet Metal Company of Jacksonville, 384 F2d 101, the employer after first attempting unsuccessfully to obtain an injunction in State Court filed charges with the NLRB. Picketing then apparently ceased some time thereafter. The reported case does not indicate how far the NLRB proceeding proceeded but it does appear from the testimony of counsel that some 22 hours were spent in the two legal proceedings. The union attempted to limit damages for legal expenses to abatement action taken prior to the removal of the pickets. The court, however, held that the cost of such legal proceedings which follow directly from the illegal activity of the union are clearly within the purview of Section 303.

A reasonable necessity existed for the continuance of the NLRB proceedings to a successful conclusion (appellant's brief, Point I B). The fact that the pickets were removed on April 9 pursuant to a temporary restraining order and the fact that R & R Handling Centres, Inc., with whom the union had the primary dispute, later ceased to be an occupant of the park, are irrelevant.

POINT II

THE APPELLEE'S ARGUMENT THAT THE CASE SHOULD BE REMANDED FOR FINDINGS AS TO THE RECIPIENT OF COUNSEL'S LEGAL SERVICES IS WITHOUT MERIT.

The appellee argues that because billings for the services of counsel were issued jointly to Northeastern Industrial Park, Inc. and to Rotterdam Ventures, Inc., Northeastern must not be permitted to recover such expenditures in the entirety. Rotterdam Ventures, Inc. is an affiliated corporation operating another and nearby industrial park to which some of the picketing had spread. This corporation is under common ownership and control with Northeastern. Rotterdam was a party with Northeastern in the NLRB proceedings. The issue of the scope of legal services rendered to each corporation was fully dealt with on the trial. On this issue Mr. Jones testified as follows:

> "But this was a service which involved no additional work. All we did was put the name 'Rotterdam Ventures, Inc.' on papers, and also in conjunction with the name 'Northeastern Industrial Park.' It took perhaps a few minutes of testimony educed by the General Counsel's Attorney in the unfair labor practice proceeding to

identify the relationship between parties.

"In essence, so it will be completely clear, the entire proceeding began with an unfair labor practice charge which I believe was dated March 26, 1971, which referred only to Northeastern Industrial Park as the charging party.

"Following that charge, and after picketing had commenced at Northeastern Industrial Park, the Teamsters Local 294 went over to Rotterdam Ventures Park in Rotterdam, and started picketing it. This picketing, if my recollection serves me correctly, involved possible pursuit of cargo that was consigned to our holdings by Northeastern. In any event, be this as it may, on April 1 Mr. Williams went to the Board, and after disposing of these circumstances of disclosing these circumstances to the Board, filed a second unfair labor practice charge, this time on behalf of the Rotterdam Ventures against Teamsters Local 294, and these were all consolidated throughout the entire proceeding, and I would have to tell you faithfully that except for the fact that my stenographer did a bit more work, maybe accumulatively, maybe an hour or so over the course of time, because she must have typed the Rotterdam Ventures, Inc. several hundred times, but this was the only difference it made in the handling of the case." (R 20, 21)

In summary, the addition of Rotterdam Ventures, Inc. as a party to the NLRB proceedings merely added another name to the title and had no significant effect upon the

extent or nature of the legal services required to be performed on behalf of Northeastern.

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO APPELLEE'S CROSS APPEAL

POINT III

THE DISTRICT COURT CORRECTLY HELD THAT LONG WAS NOT REQUIRED TO SUBMIT TO ARBITRATION PRIOR TO COMMENCING THE INSTANT SECTION 303 ACTION.

In its cross appeal from the District Court's judgment in favor of D. E. Long, Inc. the defendant-appellee argues under Point III of its brief that the District Court erred in refusing to hold that Long should have submitted to arbitration under an alleged existing agreement with Local 294 prior to the commencement of this Section 303 suit. This argument is based upon an assertion that the collective bargaining agreement contains "a clear and explicit statement that the grievance procedure must be used 'prior to the institution of any damage suit action'."

In fact, the agreement is devoid of any clear language that would contractually bar the maintenance of this suit. Article 46, §2(b) at page 109 of the alleged agreement reads in part as follows:

> "The question of whether the. . . Local Union, separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting or aiding in such stoppage, etc., in violation of this Agreement, . . . shall be submitted to the grievance procedure at the state level and if deadlocked, to the national level, prior to the institution of any damage suit action." (emphasis supplied)

It is clear that the grievance procedure requirement as a prerequisite to the institution of suit is limited to violations of the agreement. The union points to no underlying violation of its collective bargaining agreement with Long. By no reasonable construction could such language bar a §303 action for damages for illegal unfair labor practice occurring independently and outside of the scope of the collective bargaining agreement. Furthermore, the language of the purported agreement itself insures that the statutory rights of the parties shall be preserved. The final paragraph of the cited subsection reads as follows:

> "Nothing herein shall prevent the Employer or Union from securing remedies granted by law, except as specifically set forth in this subsection (b)."

In the case at bar the record clearly establishes that the union's secondary boycotting activity was in no way related to any contractual dispute under its collective bargaining agreement with D. E. Long. The picketing of D. E. Long was a contrived pretext the purpose of which was to tie up the park in a work stoppage to pressure Northeastern Industrial Park, Inc., the owner of the park, to permit picketing within the park of another employer, R & R Handling Centres, Inc. The picket signs referring to D. E. Long did not appear until four days after the picketing of the park had commenced (A129). The D. E. Long picket signs referred to clerical workers when D. E. Long employed at the time only one part-time female worker in a clerical category (A130). The president of the union had indicated on two separate occasions that his concern was not with D. E. Long but rather with arranging for picketing of another employer within the park (A127, A130, A190), and the unchallenged testimony of Mr. Grimshaw, then a vice president of D. E. Long, and Mr. Clark, a manager of Long, is that at no time were they notified by the union of

any contract dispute with Long (A164, A165, A191). The absence of any such contract dispute with Long is convincingly corroborated by the offer of the union's counsel to withdraw pickets from the perimeter of the park if Northeastern would only permit the picketing of R & R Handling Centres, Inc. at its premises within the park (A163).

It is well established that collective bargaining agreement provisions requiring the pursuit of grievance procedure remedies or arbitration prior to suit provide no insulation to a union committing an unfair labor practice under §8(b)(4) of the Labor Management Relations Act.

> Old Dutch Farms Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, etc., 359 F2d 598 (2nd Circuit)

The doctrine applies even where the union alleges that its acts are in pursuit of contract purposes.

> Iodice v. Calabrese and Teamsters and Chauffeurs Local 456, 512 F2d 383 (2nd Circuit)

These two 2nd Circuit holdings are fully dispositive of the issue as it is presented in the present case. In the Old Dutch Farms case the union had an industry-wide collective

bargaining agreement with Old Dutch Farms Inc., the employer. Old Dutch Farms filed a petition with the NLRB alleging unlawful secondary activity against the union in inducing employees of a neutral employer (a supplier of Old Dutch Farms) to engage in work stoppages and in threatening the neutral employer in an effort to cause it to cease doing business with Old Dutch Farms. The NLRB held that the union had violated §8(b)(4) and Old Dutch Farms later brought action under §303 for damages. The union moved to stay the §303 damage action on the ground that the disputes came within the purview of the collective agreement arbitration clause. That clause provided that

> "Any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein, expressly provided but germane to the subject matter of this agreement . . . shall be submitted for arbitration to an arbitrator . . ."

The Court of Appeals, 2nd Circuit, held in a persuasive opinion that the damage suit rested solely on §303, that whether or not the employer violated some

provision of the collective agreement had no bearing on the validity of the §303 suit and that the arbitration clause, therefore, did not preclude the employer from asserting in the District Court its claim for tort damages based on the alleged unlawful secondary activity.

In the Iodice case, the same court reached a similar determination in a case where the union argued that its action was a protected primary activity because it was intended to enforce a work preservation clause in the collective bargaining agreement. The District judge found that the pressure exerted on the contractors dealing with Iodice, however, was intended to force them to cease doing business with Iodice. The Court concluded, therefore, that the union had violated the statute regardless of whether other factors had also led it to take action against Iodice's customers. The Court of Appeals agreed holding that when a labor organization takes action for the purpose of forcing an employer to cease doing business with another, it violates the §8(b)(4)(B) even if it has other purposes as well.

It is clear that the contention of the defendant-appellee that D. E. Long is contractually barred from maintaining this suit is wholly without merit on both the law and the facts.

POINT IV

THE DISTRICT COURT CORRECTLY RULED THAT D. E. LONG, INC. WAS ENTITLED TO RECOVER FOR OVERHEAD AND ACTUAL EXPENSES. THE EVIDENCE ADEQUATELY SUSTAINED THE AMOUNT OF THE JUDGMENT.

The District Court in a careful and well reasoned analysis of the law and the evidence has found that D. E. Long is entitled to damages for overhead and other expenses in the amount of $5,154.00, the amount the plaintiff demanded (District Court decision and order dated September 30, 1976, pages A69, A70 and A71). The case of Sheet Metal Workers International Association Local #233 v. Atlas Sheet Metal Co., supra, 384 F2d 101, (quoted extensively by Judge Foley in the decision of the court below) is firm authority for allowing the recovery of overhead expenses as an element of damage. In this case, among the items of damage sought were a portion of the salary of an employee rendered non-productive as a result of the picketing, utility bills and "a percentage of other overhead costs." The union claimed (as does the defendant-appellee in the instant case) that the employer was not entitled to overhead expenses or utility bills because it had not shown any loss of business as a result

of the picketing. The court held that the employer may recover overhead expenses allocable to lost income which would have been generated by productive labor which was halted by the picketing. In discussing the quantum of proof the court stated that the plaintiff did not need to detail the exact amount of damages suffered. It said "It is sufficient if the evidence supports a just and reasonable approximation" citing Storey Parchment Co. v. Patterson Parchment Paper Co., 282 US 555.

As the court below has pointed out, Long's proof showed that for all practical and normal business purposes its trucking operating ceased for the period of the union's picketing from March 25 to April 9 of 1971. Its overhead expense for the preceding eleven-month period was $122,915.00. Apportioning this over the two-week duration of the picketing produced the demand figure of $5,154.00 (plaintiff's Exhibit 8). The court noted that based upon actual figures given at the trial a somewhat larger demand would have been supportable. As Judge Foley properly observed

> ". . . the damage figure under settled case law may be an approximation which falls short of mathematical certainty. Long, as a profitably run company, could have been expected to realize an income in excess of its overhead during this time. And, even if much of defendant's

> challenges were conceded, it would not greatly change the amount requested, which seems to be less than two full week's overhead based on the actual figures given at the trial and less than what might be claimed under a more complex formula."

The court below fairly concluded that $5,154.00 as overhead damages was supported by proof sufficient to make it a reasonable and fair approximation and that such a figure could not be considered excessive particularly when the evidence indicated that higher damages possibly existed but might be difficult to prove. The method of proving overhead damage though not exact nor precise was above the level of "speculation and guess." (A70, A71).

The judgment in favor of D. E. Long, Inc. should be affirmed.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

AFFIDAVIT OF SERVICE
BY MAIL

CAROL C. BEBERWYK, being duly sworn, deposes and says that she is over the age of 18 years; that she served the within plaintiff-appellant's reply brief and brief in response to cross-appeal upon the following attorneys at the following time and place in the following manner: On March 30, 1977, upon Pozefsky, Tocci & Pozefsky at 112 State Street, Albany, New York 12207, by depositing two true and correct copies of the same properly enclosed in a post-paid wrapper in the official depository maintained and exclusively controlled by the United States at 11 North Pearl Street, Albany, New York 12207, directed to said attorneys, respectively, at said address, respectively mentioned above, that being the address within the state designated for that purpose upon the last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.

Carol C. Beberwyk

Carol C. Beberwyk

Sworn to before me this
30th day of March, 1977.

Notary Public

FRANK J. WILLIAMS JR.
Notary Public, State of New York
Residing in Albany County
No. 4281700
Commission Expires March 30, 1977